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No. 01-270

In the Supreme Court of the United States

YELLOW TRANSPORTATION, INC.,

Petitioner,

v.

MICHIGAN, ET AL.,

Respondents.

On Writ of Certiorari to the Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief, we demonstrated that when Congress used the phrase "fee * * * collected or charged as of November 15, 1991" in the Intermodal Surface Transportation Efficiency Act ("ISTEA"), 49 U.S.C. § 11506(c)(2)(B)(iv)(III), it meant what it said: courts must look to the actual fee a State *did* collect or charge, not to the highest fee that the State *could have* collected or charged (what respondents refer to as the "generic fee"). Thus, reciprocity agreements must be taken into account in determining the fee that States may impose on motor carriers. At an absolute minimum, as we also argued, courts must defer to the Interstate Commerce Commission's ("ICC") reasonable conclusion that reciprocity agreements are relevant in determining a State's permissible fee under the ISTEA.

Respondents (collectively "Michigan") make no substantial response to these points. They do not even attempt to show how the statutory language — referring to fees that were "collected or charged" as of November 15, 1991 — can plausibly be read to reach fees that *were not, but theoretically could have been,* collected or charged as of that date. Nor do respondents make any meaningful attempt to explain how the many courts and agencies that agree with our reading of ISTEA could have so wildly misconstrued the statute's plain language. The decision below must accordingly be reversed.

A. The Plain Language Of The ISTEA Compels The View That Reciprocity Agreements Must Be Considered In Determining The Fee "Collected Or Charged As Of November 15, 1991"

Michigan devotes the bulk of its brief to the argument that the plain language of the ISTEA precludes the ICC's interpretation of the statute. See Resp. Br. 9-22. To succeed in that argument, Michigan would have to show that the language of the statute establishes unambiguously that the fees actually

charged under reciprocity agreements are wholly irrelevant to determining the "fee * * * collected or charged as of November 15, 1991" within the meaning of the ISTEA. Each of Michigan's attempts to make that showing ends in failure.

1. Michigan's first argument from the statutory text is that it is permitted to impose a $10 fee on *every* vehicle conducting operations in the State so long as it had imposed a $10 fee on *at least one* vehicle as of November 15, 1991. See Resp. Br. 12. That interpretation of the ISTEA, Michigan asserts, is the plain and unambiguous meaning of the statute. But the State's contention, which it did not advance below, is simply insupportable, for several reasons.

First, Michigan argues that its construction of ISTEA should be preferred because Yellow's reading of the statute ostensibly would produce a rule that is "carrier specific." Resp. Br. 12; see *id.* at 12-13, 15-16. Michigan thus asserts that, under our approach to ISTEA (and, of course, that of the ICC, the D.C. Circuit, and the Departments of Transportation and Justice), "a state may not henceforth collect or charge a $10 fee from a carrier unless it collected or charged that $10 fee from that particular carrier as of November 15, 1991." Resp. Br. 12. Michigan then proceeds to refute this supposed argument by pointing out that — under such a rule — a State would be precluded from imposing a fee on any carrier that came into existence or that expanded its operations into Michigan after November 15, 1991. *Id.* at 15-16.

Yellow, however, has never argued anything of the kind, and the ICC's construction of ISTEA does not produce any such result. Yellow has never suggested that the issue is whether Michigan charged a $10 registration fee *specifically to Yellow* as of the critical date. Rather, as Yellow argued in its opening brief, the issue is whether the fee was "collected from or charged to *carriers in Yellow's position*" as of November 1991. Pet. Br. 18 (emphasis added). Yellow's argument is, and always has been, that "the statute * * * forbids Michigan from

raising the fees that it collected or charged from each of the various categories of carriers *that it itself had established*." *Ibid.* (emphasis added). As a result, if a carrier comes into existence or expands operations into Michigan after November 15, 1991, the consequence under the ISTEA would turn on how Michigan treated similarly situated carriers as of November 15, 1991.

Moreover, as we also noted in our opening brief (at 18), the fee system established by Michigan law as of November 15, 1991, made provision for reciprocity agreements — meaning that the State's reciprocity policy was just as much an element of state law as was the statutory provision setting the so-called "generic" fees that would have been imposed in the absence of a reciprocal waiver. Surely, for example, had the Michigan statute expressly set out different fee levels for different categories of carriers as of November 15, 1991, the State could not now increase the fees charged to carriers in those various categories. But that is, in essence, precisely what Michigan seeks to do. Because Michigan had decided not to collect or charge any registration fee for Illinois base-plated vehicles as of November 15, 1991, the ISTEA prevents Michigan from collecting or charging a higher fee for those vehicles now.

Second, Michigan does not even acknowledge, let alone attempt to refute or distinguish, the avalanche of authorities that have rejected the proposition that the plain language of the ISTEA allows States to depart from reciprocity agreements. These authorities include: the ICC (see *Single State Insurance Registration,* 9 I.C.C.2d 610, 617-619 (1993) (Pet. App. 52a-54a)), the Department of Transportation (see *American Trucking Associations — Petition for Declaratory Order — Single State Insurance Registration*, 9 I.C.C.2d 1184, 1192 (1993)), the Solicitor General (see U.S. amicus Br. 12-18), the D.C. Circuit (see *National Ass'n of Regulatory Util. Comm'rs* v. *ICC*, 41 F.3d 721,729 (D.C. Cir. 1994)), the Michigan Court of Claims (see JA 21), a majority of the Michigan Court of Appeals (see JA 29, JA 34-35), and two dissenting justices of

the Michigan Supreme Court (see JA 52, JA 58). Even the SSRS Procedures Manual — a document cited as authority by Michigan (Resp. Br. 5 n.3) and lodged by the State with the Clerk of the Court — rejects Michigan's reading of ISTEA. See SSRS Procedures Manual at 21 ("Reciprocity agreement(s) in effect as of November 15, 1991 *must be considered* when determining fees to be charged under this program.") (emphasis added).

2. Michigan also relies on what it perceives to be "the legislative history of the SSRS" (Resp. Br. 13) and the "Congressional intent" (*id.* at 20) underlying the statute. See, *e.g.*, *id.* at 13-15; 20-22. Needless to say, legislative history can have no relevance in determining the plain meaning of unambiguous statutory language. See, *e.g.*, *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993); *TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). But Michigan's reading of the legislative history is, in any event, wrong on its own terms.

Michigan points to the fact that an early version of the ISTEA would altogether have prevented States from imposing registration fees while providing a one-year direct federal subsidy "to offset revenues lost" by States that "had imposed and collected fees in 1991." Resp. Br. 14 (citing H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. I, at 115 (1991), reprinted in 1991 U.S.C.C.A.N. 1641)). Michigan reasons from this history that Congress believed that the only relevant inquiry was whether a State had imposed some kind of fee in 1991, rather than one that looks to the level of fees imposed on various categories of carriers. That argument, however, is premised on a *non sequitur*. *No* version of the bill that became ISTEA would have allowed States to increase the level of fees they imposed on carriers. The statute that actually was enacted, of course, expressly froze those amounts. And Congress made clear that it intended to "*preserve* revenues for the states which had participated in the bingo program" (H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 437 (1991), reprinted in 1991

U.S.C.C.A.N. 1817 (emphasis added)), rather than allow participating States to *increase* their revenues, as would be the case under Michigan's approach.

Similarly off base is Michigan's suggestion (Resp. Br. 20-22) that it should prevail because Congress was principally concerned with "preserv[ing] the flow of revenues to the States." In fact, after requiring that the ICC's standards for the SSRS contain a fee-freezing provision (see 49 U.S.C. § 11506(c)(2)(B)(iv)(III)), Congress emphasized that imposition of fees exceeding the November 15, 1991 levels "shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 11506(c)(2)(C). That, however, is precisely the result that would follow from Michigan's approach.

3. Michigan's final argument relating to ISTEA's plain language is its observation "that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements." Resp. Br. 17. As we explained in our opening brief (at 18-19), however, all state rules (such as reciprocity policies) that precluded imposition of a fee necessarily must be considered in determining whether a fee was in fact charged or collected. Moreover, as we also noted (at 22), if there is any doubt on that question, "such silence [in a statute] * * * normally creates ambiguity. It does not resolve it." *Barrhart* v. *Walton*, 122 S. Ct. 1265, 1270 (2002). See also Resp. Br. 9 (quoting (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)) ("'if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute'"). Michigan makes no response to these points.[1]

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[1] Michigan's reliance (at Resp. Br. 18) on *Artuz* v. *Bennett*, 531 U.S. 4, 10 (2000), for the proposition that Yellow's argument "adds a condition that is not contained in the language of the statute" is perplexing. The Court observed in *Artuz* that the statute there at issue "does not contain the peculiar suggestion that a single application can

Michigan further contends that Yellow's reading of the ISTEA somehow is suspect because it effectively results in the imposition of a "zero dollars fee" on beneficiaries of reciprocity agreements and "a zero dollars fee is, by definition, no fee at all." Resp. Br. 19. We are a little puzzled about where Michigan means to go with this argument, which was not raised below; however one characterizes the nature of the statutory restriction, the clear import of the ISTEA is that States may not collect more from carriers than was collected as of November 15, 1991. In any event, to the extent it is thought to make a difference, courts in fact do routinely refer to a fee of zero. See, *e.g.*, *Farrar* v. *Hobby*, 506 U.S. 103, 117 (1992) (concurring opinion of O'Connor, J.) (examining reasonableness of attorney's fees and referring to a situation in which "a plaintiff * * * has obtained only a Pyrrhic victory for which the reasonable fee is zero"); *Jannotta* v. *Subway Sandwich Shops, Inc.*, 225 F.3d 815, 819 (7th Cir. 2000) ("'for trivial recoveries the only reasonable award of fees is zero'") (quoting *Fletcher* v. *City of Fort Wayne*, 162 F.3d 975, 976 (7th Cir. 1998)); *United States* ex rel. *Virani* v. *Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 579 (9th Cir. 1996) ("California courts have often held that when the ethical violation in question is a conflict of interest between the attorney and the client * * *, the appropriate fee for the attorney is zero."). The plain language of the ISTEA therefore disposes of Michigan's argument.

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both be 'properly filed' and not 'properly filed.'" *Id.* at 10. But Michigan seeks to give just that sort of reading to ISTEA here, since its position is that its fee was both "charged" (because, in the absence of a reciprocity agreement, it was authorized by state law) and not "charged" (because it was in fact waived under a reciprocity agreement).

B. The ICC Reasonably Determined That Reciprocity Agreements Must Be Considered In Determining The Fee A State "Collected Or Charged As Of November 15, 1991"

In addition, as we showed in our opening brief (at 20-26), if there is any doubt about the meaning of ISTEA's language, the Court should defer to the ICC's reasonable construction of the statute. As we explained, (1) Congress expressly entrusted the ISTEA to the administration of the ICC, specifically directing the ICC to prescribe standards for the SSRS; and (2) the ICC arrived at its interpretation of the statute only after an extensive notice and comment period, during which the agency received and reviewed dozens of comments from all categories of interested parties. Under these circumstances, the ICC's interpretation of the ISTEA must be deemed correct unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Michigan does not take issue with any of these points. It contends, instead, that the ICC's approach must be rejected because the agency's "construction [of the ISTEA] is not an interpretation, but a rewrite." Resp. Br. 23; see *id.* at 23-27. This contention is insubstantial.

First, Michigan contends (Resp. Br. 23-25) that the ICC's interpretation of the ISTEA is contrary to the statute because the agency construes the term "fee * * * collected or charged as of November 15, 1991" to refer to multiple fee levels rather than only one fee level per State. But as Michigan concedes (*id.* at 23-24), Congress has expressly provided that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise — words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1.[2] The ICC thus was hardly arbitrary or capricious

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[2] In its brief (at 23), Michigan quotes the initial (1947) version of this statute, which provided that "[i]n determining the meaning of any Act or resolution of Congress words importing the singular number may extend and be applied to several persons or things." Pub. L. No.

in assuming that "fee" might mean varying fee levels when Congress has expressly provided for that result. That is especially so because there is no reason to believe that Congress intended to require the ICC to supersede varying fee levels that States had chosen to impose prior to November 15, 1991. After all, if Michigan is correct that all vehicles in a State must pay the same amount, the ICC could well have been required to provide that States with reciprocity waivers (such as Michigan) could not impose fees on *any* vehicles.

Second, Michigan asserts that the ICC's approach is inconsistent with the statute because it precludes the collection of fees from particular carriers even though Congress capped fees "at $10 per vehicle." Resp. Br. 26; see *id.* at 25-27. But this argument simply disregards the statutory language. The $10 figure is an upper limit; the rest of the provision provides that a State may not impose a fee that is larger than the one "such State collected or charged as of November 15, 1991." 49 U.S.C. § 11506(c)(2)(B)(iv)(III). And for reasons already explained, Michigan is wrong in reading ISTEA to allow it to collect $10 for *every* vehicle so long as it was collecting $10 for *any* vehicle as of November 15, 1991. As a consequence, the ICC's well-reasoned construction of the ISTEA must be regarded as authoritative.

C. Reversal, Not Remand, Is The Appropriate Disposition In This Case

Finally, although *amicus* United States plainly is correct in its analysis of the merits here, it is incorrect in suggesting that the case should be remanded for consideration of additional issues. See U.S. Br. 22-24. Neither of the additional questions raised by the United States requires further consideration on remand, and reversal therefore is the appropriate disposition.

80-278, § 1, 61 Stat. 633 (1947). We quote the current version, as it was amended by Pub. L No. 80-772, § 6, 62 Stat. 859 (1948) — although the differences obviously are immaterial.

The United States first suggests (U.S. Br. 22-23) that the case should be remanded to allow the Michigan Supreme Court to resolve an argument that Michigan raised below and in its Brief in Opposition *but no longer presses* — that the phrase "collected or charged as of November 15, 1991" was intended to refer to fees paid in 1991 for the 1992 registration year. See Pet. Br. 26-29. There is no need for a remand on that issue. We argued in our opening brief that this contention, which has been rejected by the ICC, is without merit. See *ibid.* Michigan does not respond to this argument in its brief on the merits or advance it as an alternative ground for affirmance. Moreover, when confronted with this issue, the court below declined to make it an alternative ground for its ruling. Reversal therefore is appropriate here.

The United States also posits that "[t]his case * * * may be complicated by the informality of Michigan's reciprocity policies." U.S. Br. 23. Citing extra-record material such as "[i]nformation gathered by the Department of Transportation" (*ibid.*), the United States suggests that there might be additional facts regarding those policies — not advanced by either party — that have some relevance here. Significantly, respondents did not adopt this argument in their merits brief. In these circumstances, there plainly is no need for a remand to address factual issues that neither the parties nor any of the courts below has ever identified as being of any concern.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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